Eddyleon Chocolate Company, Inc. *and* United Food and Commercial Workers, AFL–CIO, Local 72. Cases 4–CA–15535, 4–CA–15636, 4–CA–25659, 4–CA–15716, and 4–RC–16121

February 27, 1991

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 15, 1988, Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel and the Respondent both filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] recommendations,[3] and conclusions, as modified below, and to adopt his recommended Order, as modified.

1. The judge found that the Respondent's president, Gilbert Shwom, joined by Vice President-Plant Manager Stanley Glasbrenner, made the following request of job applicant Jeanie Cicon during her employment interview: ''We would like for you to sign a paper stating that you will not join a union or be affiliated with unions in any way.'' Cicon indicated that she was not interested in unions because she had already been solicited to join a union and had declined. Shwom turned to Glasbrenner in Cicon's presence and said ''[w]e'll have to see if this is legal, then we'll draw one up and have her sign it.'' Cicon was hired on the spot. She was not thereafter presented with or requested to sign what we shall call a proposed ''yellow-dog contract.'' The judge recommended dismissal of the allegation that Shwom's remarks violated Section 8(a)(1) because the ''unlawful yellow dog contract was barely mentioned,'' and because the Respondent did not carry through its threat to require employees to sign one. We disagree.

Even before passage of the Wagner Act, Congress enacted broad prohibitions against yellow-dog contracts.[4] It is axiomatic that such agreements and their solicitation are barred under the 8(a)(1) prohibition of coercion directed at employee exercise of rights protected by Section 7. Here, not only was the prospect of working under a yellow-dog contract raised at the job interview, but Cicon was asked to make known to her employer whether she was willing to sign such a document as the final interview question before she was extended an offer of employment. Cicon could reasonably have anticipated that her future employment depended on whether she refrained from union activity, regardless of whether the pledge not to ''join a union or be affiliated with unions in any way'' was reduced to writing.[5] The Respondent's request was coercive and violated Section 8(a)(1).

2. The judge found that President Shwom also violated Section 8(a)(1) by twice creating the impression of surveillance of union activity. On November 22, 1985, he approached employees Becky Butler and Linda Seeley at their machines and told them that he had heard that they and a third employee were for the Union. Later, in mid-March 1986, Shwom called employee James Masters into his office and told him that he knew Masters was for the Union. The judge found that Shwom also violated Section 8(a)(1) when, in mid-March, he asked employee Robert Skasko to give him the names of those present at union meetings Skasko had attended, and Shwom checked off the names on a list as Skasko gave them to Shwom.

In addition to these violations, we find, contrary to the judge, that the Respondent's pattern of unlawful surveillance extended to incidents occurring on December 19, 1985, and March 19, 1986. On the first occasion, Shwom drove his car to within 15 feet of Union Representative Daniel Scalzo and watched employees as Scalzo handed them literature on a public bridge near the entrance to the Respondent's parking lot. As he watched, Shwom spoke into his car tele-

[1] As reflected in the Direction, we adopt the judge's ruling granting the Respondent's November 4, 1987 motion to reopen the record to resolve in a supplemental hearing the voter eligibility status of Rosemary Carey, Hector Colon, Florencio Gomez, and Lucien Delva in the event that their ballots prove determinative. We reverse the judge's recommendation to overrule the challenge to the ballot of Paul Bellock, find that his eligibility status remains unresolved, and direct that, in the event a supplemental hearing on determinative ballots is conducted, the hearing officer shall also adduce evidence as to Bellock's status.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find it unnecessary to pass on the judge's findings that the Respondent solicited employees to form a labor organization by circulating memoranda to employees on November 23 and December 20, 1985, respectively, entitled ''Eddyleon Performance Record to Date'' and ''Let's Clear the Air.'' Any violation based on these memoranda would be cumulative and thus would not affect the remedy or Order.

In adopting the judge's findings of 8(a)(1) interrogations, we note that they are in accordance with Board standards set forth in *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

The judge inadvertently referred to memoranda circulated to employees on August 23 and 30, 1985, as the basis for finding an unlawful promise of benefits that were later granted. The promises were in a December 17, 1985 memorandum.

[3] We find it unnecessary to pass on the judge's recommendation to overrule Objections 10 and 11 in view of our disposition of the representation proceeding, as described below.

In the absence of exceptions, we adopt pro forma the judge's recommendation sustaining challenges to the ballots of Catherine Bonitz and Jeanie Cicon, and overruling a challenge to Judith Wilbur's ballot.

[4] Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101–115 (1964).

[5] See *Gilberton Coal Co.*, 291 NLRB 344 (1988).

phone. Shwom did not leave until the handbilling had ceased.[6]

During the second incident, Shwom ordered Scalzo and several employees off the bridge while they were handing out union leaflets. Several other employees were in their cars leaving the plant parking lot at the time. When the leafletting continued on the bridge and Scalzo refused to leave, Shwom threatened to, and did, call the police.[7] Then, as employees received leaflets through their car windows, Shwom pointed to the individual employees and screamed: ''Give him one, give her one, they're union supporters.'' Scalzo advised Shwom he was committing an unfair labor practice, and Shwom replied: ''Go ahead, file charges. I don't give a damn about the goddamn Labor Board. I have a good attorney and lots of money.''[8]

We have no quarrel with the judge's observation that those who choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when management observes them.[9] The Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not ''do something out of the ordinary.''[10]

On these occasions, however, Shwom's behavior was well ''out of the ordinary.'' During the December leafletting, Shwom moved his vehicle from the point where he could see and communicate with Scalzo to within 15 feet of where Scalzo was stationed and spoke on his car phone until Scalzo left. In the March incident, Shwom threatened to call the police to eject Scalzo from a public bridge, loudly accused individual employees accepting union literature of being union supporters, threatened to close the plant and lay off employees who supported the union, and caused the police to descend on the bridge. These incidents bear little similarity to the brief, casual employer observations of union activity found not to be unlawful in the cases cited by the judge.[11] We find that the Shwom's participation in these incidents created an impression of surveillance in violation of Section 8(a)(1).

3. The complaint alleges that on February 25, 1986, the Respondent discharged employee David Williams because it believed Williams supported and assisted the Union. The facts, essentially as found by the judge, are as follows. Williams was a maintenance man specializing in refrigeration. On Monday, February 3, 1986, Williams was assigned to a production job. Supervisor Wayne Stueck excused Williams early that day, when Williams complained that he was ill. After another employee became ill and went home a few minutes after Williams left, President Shwom, to whom Stueck reported the excused absences, called both employees at home. When no one answered the phone at either house, Shwom wrote the employees a letter indicating that they would have to bring doctors' notes to work to verify their illnesses or be discharged. Thursday of that week, Williams returned to work with a note indicating that he had been under doctor's care since the day of his early departure and had been unable to work from Monday through Wednesday. The doctor's note also stated ''light duty suggested for balance of the week.'' Williams worked all day Thursday.

Friday morning, Stueck ordered all maintenance employees, including Williams, to work on the production lines demolding chocolate bars (i.e., dumping the bars out of their molds). Williams told another employee he was still suffering from the flu and could not perform the new job. Williams told Stueck only that he ''couldn't do the work.'' Stueck became angry and said: ''I'm sick and tired of all you guys' shit, punch out.'' According to Stueck, this conversation lasted only seconds—less than a minute.

Williams saw Company Vice President George Marsden before punching out and told Marsden he was sick. Marsden gave Williams permission to go home. As Williams was preparing to leave, he met Stueck again. This time he did relate to Stueck that he was ill, and Stueck replied: ''No, you're not going home because you're sick; you're going home because you didn't do the job I told you to do.'' After Williams left, Shwom wrote him a letter informing Williams that he had been discharged.

The General Counsel has made a strong prima facie showing that union activity was a motivating factor in Williams' discharge. In addition to having signed an authorization card and attending union meetings, Williams was directly accused by Shwom on December 10

[6] Before driving to within 15 feet of Scalzo, Shwom had sat in his parked car near the bridge and had watched the leafletting for 10 minutes. From that point, Shwom, who was under the misapprehension that the Respondent owned the bridge, asked Scalzo to get off the bridge. Scalzo refused.

[7] The complaint does not specifically allege that Shwom's call to the police or his threat to make the call was unlawful.

[8] During the same encounter, Shwom threatened to close down the plant or sell it to keep the Union out and promised to lay off ''another pile of their [the Union's] friends'' the next day.

[9] *Milco, Inc.*, 159 NLRB 812, 814 (1966), enfd. 388 F.2d 133 (2d Cir. 1968). Accord: *Chemtronics, Inc.*, 236 NLRB 178 (1978); *Larand Leisurelies*, 213 NLRB 197, 205 (1974), enfd. 523 F.2d 814 (6th Cir. 1975).

[10] *Metal Industries*, 251 NLRB 1523 (1980) and cases cited there; *Southern Maryland Hospital*, 293 NLRB 1209 (1989), enf. denied 916 F.2d 932 (4th Cir. 1990), on grounds, irrelevant here, that the employer enjoyed a right in trespass against those subject to surveillance.

[11] In *EDP Medical Computer Systems*, 284 NLRB 1232, 1265–1266 (1987), employer representatives on two occasions observed leafletting at the employer's premises and on a third occasion honored the requests of two employees who had expressed fear of election-day violence by sitting outside the plant until the employees arrived for work. The judge, whose dismissal of the pertinent portions of the complaint the Board adopted, noted the credited evidence of an employer representative who, during one incident, had held papers in her hand as she observed handbilling, that the papers were ''business-related work'' and not note-taking of union activities. In *Emenee Accessories*, 267 NLRB 1344 (1983), the Board found no unlawful impression of surveillance where the employer simply observed conversations between its employees and union organizers as the employees reported to work. In *R. H. Macy & Co.*, 267 NLRB 177, 179 (1983), security guards witnessed handbilling inside a mall where the respondent's store was located from a mall bench, and later from a restaurant table. In *Palby Lingerie*, 252 NLRB 176 (1980), the employer engaged in ''no more than a brief inspection'' of union solicitation.

of being a union organizer and was threatened with layoff.[12] A week later, Vice President and Plant Manager Glasbrenner motioned for Williams to come over to where Glasbrenner was standing in the production area and told him: ''Dave, this is the second time I heard that you're involved with the Union.'' We find violations of Section 8(a)(1) based on both these events. The record amply documents the Respondent's strong antipathy to the Union generally, as well as specific animus harbored against Williams, whom it dubbed a ''union organizer.''

The judge recommended dismissal of the discharge allegation, however, because he concluded that Supervisor Stueck had had an honest belief that Williams was insubordinate in telling Stueck he could not perform the demolding work. We disagree with the judge's conclusion that ''insubordination'' alone was the Respondent's reason for the discharge. We find that, however honest a belief Stueck may have had about Williams' unwillingness to work when he gave him his assignment, the Respondent's subsequent administration of discipline by discharge evidences that its asserted motive is pretextual. In short, the Respondent has not overcome the strong prima facie evidence of antiunion animus by a showing that Williams would have been discharged for cause in any event.

Williams was not discharged by Stueck during their confrontation on the production floor. According to Stueck, Williams could have returned to his job any time later that day. Stueck knew of Williams' illness earlier in the week and knew before Williams left the plant that he was again complaining of illness. Stueck also acknowledged the company policy on illness complaints, corroborated by his superiors, President Shwom and Vice President Marsden:

> Q. What are the company rules concerning an employee who says he or she is sick?
>
> A. If they're sick, they can punch out and go home, no problem.
>
> Q. How do you determine that?
>
> A. By them saying it.

Thus, at the time the termination decision was made, both Stueck and Marsden, who had given Williams permission to go home sick, knew that Williams had complained that he was still ill. Company policy provided that they permit him to leave on the strength of his claim. Nonetheless, the Respondent did not investigate further to resolve its alleged doubt of Williams' good faith. Indeed, the Respondent knew that Williams' claim of illness was supported by a doctor's excuse from earlier in the week. The doctor had recommended that Williams perform ''light work'' that day; demolding is one of the more physically demanding jobs in the production process.[13] We are persuaded that the Respondent seized on Stueck's report of insubordination as a pretextual ground for discharge, notwithstanding its knowledge that illness justified Williams' resistance to the demolding assignment.

The Respondent's departures from established procedures in disciplining Williams lend further support to a finding of pretext. President Shwom reacted to Williams' Monday absence by informing him in writing that he would be discharged if he did not document his illness by providing a doctor's excuse. The Respondent's progressive disciplinary policy described at hearing by Vice President Marsden, however, called for an oral and a written warning before discharge. Thus, even the Respondent's reaction to Williams' first absence betrayed an overzealous bent to accelerate disciplinary procedures against Williams.[14] As to the ultimate discharge, the Respondent's practice, described above, is to allow employees to go home whenever they feel sick—a practice followed partially out of concern for the potential contamination of chocolate. With full knowledge of Williams' medical excuse, his claim of continued illness, and the nature of Williams' new assignment, the Respondent's asserted basis for discharge is unpersuasive. We find that the Respondent has not met its burden under *Wright Line*[15] of overcoming the prima facie case by proving that it would have discharged Williams in the absence of his union activities. Accordingly, we find that Williams' discharge violated Section 8(a)(3).[16]

4. The complaint alleges that the Respondent violated Section 8(a)(3) on March 21, 1986, when it laid off Peter Zelinski, Michael Studders, Stanley Drag, Victoria Tonte, Nancy Scarantino, James Walker, Wendy Vogel, and Lydia Dallasandro; and on March 27, 1986, when it laid off Bonnie Spittel, Janice Spittel, Lucy Gontkowski, Robert Skasko, James Masters, Dorothy Resavy, Kevin Goula, and Josephine Rizzo.

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[12] Contrary to the judge, we find that Shwom's December 10 remark to Williams immediately after telling him it was rumored he was a union organizer—''Dave, you should have technically been on layoff but Wayne [Stueck, his supervisor] speaks so highly of you''—is an 8(a)(1) threat because the remark was made gratuitously in the context of an accusation that Williams was organizing employees. See *Waterbed World*, 286 NLRB 425, 427 (1987).

[13] Demolding, or ''banging molds,'' is the procedure of hammering chocolate bars that emerge from a conveyor belt onto cardboard, stacking the bars that are hammered out, and throwing the empty molds back onto the conveyor belt. Employee Becky Butler described the job as ''very strenuous, you'd get a blister'' and difficult to perform because of the speed of the production equipment. Even Stueck, who denied that demolding was strenuous work, acknowledged that it was perceived by some to be difficult, and was rendered difficult by its repetitive nature. Williams' regular duties of air-conditioning maintenance required him to fill air-conditioning units from large freon tanks, which he carted throughout the plant. Because it took up to 30 minutes to fill a unit, he had more opportunities to rest in maintenance. Production work required that he move constantly at a rapid pace.

[14] As reported above, employee James Masters had received an identical written notice. A month later, Shwom told Masters that he knew that Masters was active in the Union.

[15] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), affd. in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[16] No reinstatement is ordered for Williams, who is deceased.

On March 19, 2 days before the layoffs began, President Shwom had told Union Representative Scalzo during the incident on the bridge that he intended to lay off a ''bunch of [Scalzo's] friends'' and identified Janice and Bonnie Spittel, and Lucy Gontkowski as among Scalzo's supporters. Two days later, Shwom coerced employee Skasko into furnishing him a list of persons who had attended union meetings, obtaining the names of Zelinski, Tonte, Scarantino, Vogel, Skasko, Resavy, and Goula. About the same time, Masters was called into Shwom's office, told that it was known that he was active in the Union, and coercively interrogated. Walker had been the target of an 8(a)(1) solicitation of grievances by Vice President Glasbrenner in mid-January. The remaining four alleged discriminatees had either a recorded attendance at union meetings or had signed authorization cards before their layoffs. The representation election was conducted April 3, 1986.

The judge found that the Respondent's decision to lay off a large number of employees, including some not alleged to be discriminatees, was economically motivated and not a violation of Section 8(a)(3). The judge observed that the Respondent's business is seasonal in nature, typically winding down during the spring, and that the Respondent drops its employee complement to six or seven for the summer months. The judge also noted that some of the alleged discriminatees had been retained during the production season, notwithstanding the Respondent's knowledge of their union support. He also observed that further layoffs, not alleged to have violated the Act, occurred the following month and that several union supporters were recalled in the fall. Although we do not take issue with these findings, on which the judge based his recommended dismissal of the 8(a)(3) allegation, the analytic framework of *Wright Line*, above, leads us to the contrary conclusion, i.e., that the layoffs were accelerated for discriminatory reasons.

President Shwom's threat to lay off Union Representative Scalzo's ''friends'' during the incident on the bridge only 2 days before the March 21 layoffs brings into sharp focus the Respondent's intent in announcing those layoffs. The correlation between known union supporters—those Shwom had singled out on the bridge and on the list of those attending the union meeting that Shwom had just then obtained[17] —and employees selected for layoff is striking. That Shwom may have cast a wide net, so as to lay off others not named in the complaint, does not detract from the strong prima facie showing of discrimination established by the General Counsel. As the Board stated in *Alliance Rubber Co.*,[18] where

> there is powerful evidence of union animus, and where the explanations given for the timing and selection criteria are not credible, the fact that a few employees who had not supported the Union were expelled along with those who had . . . does not preclude the finding that discriminatory motives lay behind the timing and selection.[19]

As to the asserted economic defense, there is scant record evidence to support the Respondent's contention that layoffs were economically justified as early in its season as March. The Respondent's principal supporting documentation is a one-page sales summary for two seasons, which places sales for March at a season high. The only evidence the Respondent introduced at hearing concerning customer orders during the time at issue were projections from a major customer that had been furnished the Respondent at the beginning of the production season. Although the Respondent maintained that this exhibit supported President Shwom's assertion that sales to that customer had decreased by one-third during the 1985–1986 season, it was fatally attacked by the General Counsel, who introduced evidence showing upward adjustments authorized by the customer during the same season. The Respondent was apparently unable to furnish the supporting purchase orders to validate its claim, and attempts by President Shwom on the stand to explain the discrepancy were unavailing. This evidence falls far short of the substantial burden the Respondent shoulders in overcoming the General Counsel's powerful prima facie showing of discrimination.

The Respondent's evidence may be sufficient to show that, as the season progressed, most, if not all, of the discriminatees would have been laid off for lawful economic reasons related to the production cycle. But the economic data in the record does not justify an accelerated layoff. Particularly where that precise form of retaliation—a layoff—was unambiguously threatened only days before it was carried out, much more is needed to show that the layoff at that time was for nondiscriminatory reasons. As to evidence that some—though by no means most—of the discriminatees were recalled the next season, that is only a testament to the Respondent's need for the skills of experienced employees to run production, as Shwom acknowledged. We find that the Respondent has not met its burden under *Wright Line*, and that the

[17] According to the credited testimony of Robert Skasko, Shwom elicited information about union supporters by bluntly demanding: ''Names, I need names.'' The March layoffs included Skasko and every employee he named.

[18] 286 NLRB 645, 647 (1987).

[19] See also *Link Mfg. Co.*, 281 NLRB 294, 299 fn. 8 (1986) (''Respondent's reaction was thus in the nature of a 'power display' in response to the advent of the Union . . . .'').

layoffs violated Section 8(a)(1) and (3) of the Act, as alleged.[20]

5. In his recommended Order, the judge provided, inter alia, that, if, on the disposition of the challenged ballots, it is determined that a majority of valid votes were not cast for the Petitioner, the election be set aside based on meritorious objections and a new election conducted. The judge declined the General Counsel's request for a *Gissel* bargaining order. The General Counsel excepts, arguing that, in the event the Union has lost the election, a bargaining order should issue. We agree with the General Counsel that a bargaining order is necessary.

The Union made a demand for recognition on December 23, 1985, and the demand continued.[21] The complaint alleges that the Union had achieved majority status on January 17, 1986. The payroll register for January 17 shows that 44 employees were actively employed by the Respondent and that 17 additional employees were on temporary layoff.[22] The Union had at least 33 valid authorization cards on that date.[23] We find that on January 17, 1986, the Union enjoyed the support of a majority of the Respondent's employees.

The record reveals a veritable catalogue of unfair labor practices, numerous and far-reaching, spanning the course of the Union's election campaign and continuing thereafter. As set forth above and in the findings of the judge that we adopt, the Respondent: (1) twice threatened plant closure; (2) on six occasions threatened orally to warn union supporters, to issue them written warnings, or to lay them off or discharge them; (3) coercively interrogated eight employees; (4) on four occasions created the unlawful impression of surveillance of union activity; (5) solicited grievances; (6) communicated five written or oral promises of benefits and granted the promised benefits; (7) ordered a mass layoff and a discharge in retaliation for union activity; (8) requested the names of all employees attending union organizing meetings; (9) solicited employees to form their own labor organization; and, (10) requested a job applicant to sign a yellow-dog contract.

These unfair labor practices include numerous examples of what we term ''hallmark violations,''[24] including some of the most pernicious—plant closure and layoff threats and discriminatory discharges and layoffs. These are the most flagrant forms of interference with Section 7 rights and are more likely to destroy election conditions for a longer period of time than are other unfair labor practices because they tend to reinforce employees' fear that they will lose employment if union activity persists.[25] All the violations were committed by individuals at the top of the management hierarchy—the majority by its president.[26]

The severity and extensiveness of the Respondent's unfair labor practices are underscored by its record of interrogating employees about their testimony at Board proceedings and of instructing an employee to withhold testimony at the hearing of these unfair labor practice charges. Thus, the futility of holding a fair rerun election is evident not only from the likely lingering effect of the Respondent's misconduct on employee free choice, but also from the Respondent's apparent determination to avoid a fair election, even at the risk of abusing the Board's processes. The likelihood of the Respondent's misconduct recurring in a rerun election is high, as the Respondent's postelection conduct reveals continued hostility to employee rights.[27] We find, accordingly, that the possibility of erasing the lingering effects of the Respondent's unfair labor practices and of ensuring a fair rerun election by traditional remedies is slight.[28]

We reject the judge's finding that the Respondent's unfair labor practices have necessarily failed to dissipate the Union's campaign. The judge found that the Union's campaign appeared to have gained momentum after the discharge of Edward Zaleski on December 12, 1985, and that the vast majority of authorization cards were signed between November 23, 1985, and February 23, 1986, notwithstanding the Respondent's violations during that period. The most serious and perva-

[20] Because the discriminatees would ultimately have been laid off later in the season—for at least the duration of the summer shutdown—for lawful economic reasons, we leave to compliance the determination of the period during which backpay should be tolled.

[21] See *Scotts IGA Foodliner*, 223 NLRB 394 (1976).

[22] The judge found that the Respondent had advised the 17 employees laid off November 23, 1985, that they would be contacted in the future, consistent with the Respondent's seasonal business. (In fact, eight were subsequently recalled, and the judge found that the remaining nine had not been permanently discharged.) Thus, on January 17, all 17 had a reasonable expectancy of recall.

[23] The Respondent has excepted to the inclusion of cards executed by James Masters and John Davis on the ground that their testimony at the hearing established that their cards' solicitations ran afoul of the Supreme Court's holding in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). As the Union has established a majority without reliance on the authorization cards executed by Masters and Davis, we find it unnecessary to determine the validity of their cards. We have also omitted the undated authorization card of Janice Spittel. Exceptions to the inclusion of other authorization cards are without merit.

[24] See, e.g., *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980); *Highland Plastics*, 256 NLRB 146, 147 (1981).

[25] See *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enfd. mem. 833 F.2d 310 (4th Cir. 1987), cert. denied 485 U.S. 1021 (1988).

[26] See *Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 978 (3d Cir. 1980), cert. denied 449 U.S. 871 (1980).

[27] See *Chromalloy American Corp. v. NLRB*, 620 F.2d 1120, 1131 fn. 8 (5th Cir. 1980) (postelection violations ''are always relevant because they demonstrate that the employer is still opposed to unionization''); *Steel-Fab, Inc.*, 212 NLRB 363 (1974); *Larid Printing*, 264 NLRB 369, 371 (1982); *Long-Airdox Co.*, 277 NLRB 1157, 1160 (1985).

[28] Because the effects of the Respondent's preelection violations were subsequently reinforced by the commission of postelection unfair labor practices, we find no merit in the Respondent's contention that the passage of time here could warrant our withholding a bargaining order. See *Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980). As to the significance of employee turnover, which the Respondent argues is also a mitigating circumstance, the Board has consistently held that the validity of a bargaining order depends on an evaluation of circumstances when the unfair labor practices were committed, and that to withhold such an order where turnover has occurred would reward, rather than deter, the party engaging in unlawful conduct. See *Highland Plastics*, supra; *Salvation Army Residence*, 293 NLRB 944, 945 (1989).

sive unfair labor practice, however, occurred toward the end of the campaign, including the flagrant threats of plant closure and layoff by President Shwom during the bridge incident, a variety of surveillance tactics, an unlawful preelection promise of a wage increase, the discriminatory March layoffs, and other unlawful threats and interrogations.

Further, the record shows a downturn in employee attendance at union meetings as the election neared. Thus, at the Union's March 25, 1986 meeting—a little over a week before the election—only 11 employees attended, including only 4 of the employees who had not been laid off. This contrasts with attendance by 26 employees at a February 23 meeting. Finally, because of the large number of determinative challenged ballots that have not been opened here, it cannot be established empirically, as it was in *Times Wire & Cable Co.*,[29] cited by the judge, how the Union's momentum may have changed over the course of the campaign in response to the Respondent's misconduct.[30]

Accordingly, we find that the employees' representational desires expressed here through authorization cards would, on balance, be better protected by a bargaining order than by traditional remedies, if the final revised tally shows that the Union has not won the election. In the event that a final revised tally of ballots shows that the Union has won the election, we conclude, in agreement with the judge, that the Union is entitled to a certification of representative, but in addition to our bargaining order. We shall further provide that, if the final revised tally of ballots shows that the Union has lost the election, the election shall be set aside, the petition shall be dismissed, and the bargaining order shall take effect.[31]

AMENDED REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Edward Zaleski and David Williams were discriminatorily terminated and that Peter Zelinski, Michael Studders, Stanley Drag, Victoria Tonte, Nancy Scarantino, James Walker, Wendy Vogel, Lydia Dellasandro, Bonnie Spittel, Janice Spittel, Lucy Gontkowski, Robert Skasko, James Masters, Dorothy Resavy, Kevin Goula, and Josephine Rizzo were discriminatorily laid off, we shall order that the Respondent offer full and immediate reinstatement to each, except for David Williams (deceased), and that it pay them backpay and interest, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In the case of those discriminatorily laid off, however, backpay shall be tolled for any period after March 21 and 27, 1986, the dates of the layoffs, that the Respondent proves at compliance that it would have laid off these individuals for legitimate economic reasons.

Having found that a bargaining order is appropriate, we shall order the Respondent, on request, to bargain collectively with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All regular full-time and regular part-time production and maintenance employees employed at the Moosic, Pennsylvania facility but excluding all other employees including but not limited to, managerial employees, foremen, clerical employees, seasonal employees, casual employees, guards and supervisors as defined by the Act.

In the event a bargaining order takes effect without a certification of representative, for reasons set forth in this decision we shall order that the election held in Case 4–RC–16121 be set aside, and that the petition in that matter be dismissed.

Nothing in our Order shall authorize or require the Respondent to rescind wage increases and benefits that have been conferred.

ORDER

The Respondent, Eddyleon Chocolate Company, Inc., Moosic, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression of surveillance of its employees' union activities.

(b) Promising employees wage increases, bonuses, insurance, and other benefits.

(c) Granting employees wage increases and bonuses.

(d) Interrogating employees about their own union activities and those of other employees.

(e) Threatening employees with discipline and discharge if they refuse to distribute antiunion literature.

(f) Soliciting grievances and complaints from employees, thereby promising them improved terms and conditions of employment.

(g) Soliciting employees to form a labor organization.

(h) Threatening employees with a reduction in benefits, layoffs, closure of the facility, and other unspecified reprisals because of their union activities.

[29] 280 NLRB 19 (1986).

[30] In *Times Wire*, all but one of the unfair labor practices on which the General Counsel predicated the request for a *Gissel* bargaining order occurred prior to an earlier election that the Union had won and that had been set aside. There were no challenged ballots in that election. *Aircap Mfrs.*, 287 NLRB 996 (1988), also cited by the judge, is distinguishable because there ''the violations found were not the sort generally regarded as of a pervasive nature; there were no threats of plant closure, grants of benefits, and the single 8(a)(3) violation ha[d] been mitigated . . . .'' Id. at 999.

[31] See *Kurz-Kasch, Inc.*, 239 NLRB 1044 (1978).

(i) Interrogating employees as to the nature of their testimony at Board hearings.

(j) Instructing employees to withhold evidence while testifying at Board hearings.

(k) Soliciting employees to sign contracts stating that they will not join a union or be affiliated with unions in any way.

(l) Discharging employees in reprisal for their union activities.

(m) Laying off employees in reprisal for their union activities.

(n) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Edward Zaleski, Peter Zelinski, Michael Studders, Stanley Drag, Victoria Tonte, Nancy Scarantino, James Walker, Wendy Vogel, Lydia Dellasandro, Bonnie Spittel, Janice Spittel, Lucy Gontkowski, Robert Skasko, James Masters, Dorothy Resavy, Kevin Goula, and Josephine Rizzo, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them and David Williams whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy.

(b) Remove from its files any reference to the unlawful discharges and layoffs and notify the employees in writing that this has been done and that the discharges or layoffs will not be used against them in any way.

(c) On request, bargain with United Food & Commercial Workers, Local 72, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time and regular part-time production and maintenance employees employed at the Moosic, Pennsylvania facility but excluding all other employees including but not limited to, managerial employees, foremen, clerical employees, seasonal employees, casual employees, guards and supervisors as defined by the Act.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Moosic, Pennsylvania facility copies of the attached notice marked ''Appendix.''[32] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

IT IS FURTHER ORDERED that the challenges to the ballots of Jeanie Cicon, John Zelinski, and Catherine Bonitz be sustained, and that the challenges to the ballots of the following employees be overruled: David Williams, Peter Zelinski, Mary Catherine Shively, James Walker, Lois Thompson, Wendy Vogel, Victoria Tonte, Kevin Goula, Judith Wilbur, Dorothy Resavy, James Masters, Michael Studders, Nancy Scarantino, Robert Skasko, Sharon Thorne, and Armond Poli.[33]

IT IS FURTHER ORDERED that Case 4–RC–16121 is severed from Cases 4–CA–15535, 4–CA–15636, 4–CA–25659, and 4–CA–15716, and that it is remanded to the Regional Director for Region 4 for action consistent with the Direction below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 4 shall, within 10 days from the date of this decision, open and count the ballots of David Williams,[34] Peter Zelinski, Mary Catherine Shively, James Walker, Lois Thompson, Wendy Vogel, Victoria Tonte, Kevin Goula, Judith Wilbur, Dorothy Resavy, James Masters, Michael Studders, Nancy Scarantino, Robert Skasko, Sharon Thorne, and Armond Poli, and that he prepare and serve on the parties a revised tally.

If, after the preparation and service of the revised tally, the challenged ballots of the following employees prove determinative, the Regional Director shall designate a hearing officer to adduce additional evidence as to whether they are statutory supervisors within the meaning of Section 2(11) of the Act: Rosemary Carey, Hector Colon, Florencio Gomez, and Lucien Delva. The hearing officer shall also adduce additional evidence as to whether employee Paul Bellock was either hired and working on the eligibility date or on layoff status, and, if laid off, whether he enjoyed a reasonable

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[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[33] In adopting the judge's finding that employees who had been unlawfully laid off March 21 and 27, 1986, are eligible voters, we agree with the judge that they enjoyed a reasonable expectancy of recall. We also rely on their status as unlawfully laid off employees.

[34] Contrary to the judge, we overrule the challenge to the ballot of David Williams in light of our finding that Williams was unlawfully discharged before the election.

expectancy of recall. In the event of a hearing, the Regional Director shall prepare and serve on the parties a second revised tally.

If the final revised tally in this proceeding reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, and vacate the proceedings in Case 4–RC–16121.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT promise you wage increases, bonuses, insurance and other benefits in order to discourage you from supporting the Union.

WE WILL NOT grant wage increases and bonuses in order to discourage you from supporting the United Food and Commercial Workers, AFL–CIO, Local 72. We are, however, not authorized or required to withdraw, vary, or abandon any wage increases or benefits that you have been granted.

WE WILL NOT question you about your union activities or about the union activities of your fellow employees.

WE WILL NOT threaten you with discipline or discharge for refusing to distribute our antiunion literature.

WE WILL NOT solicit grievances and complaints from you in order to imply promises or improved terms and conditions of employment in order to discourage your union activity.

WE WILL NOT ask you to form your own labor organization instead of joining a union of your choice.

WE WILL NOT threaten you with a reduction in benefits, layoffs, other reprisals, or plant closure in order to discourage you from engaging in union activity.

WE WILL NOT question you as to the nature of your testimony at National Labor Relations Board hearings or instruct you to withhold evidence while testifying before the Board.

WE WILL NOT discharge you or lay you off because you engage in union activity.

WE WILL NOT ask you to sign agreements stating that you will not join unions or be affiliated with unions in any way.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL offer Edward Zaleski, Peter Zelinski, Michael Studders, Stanley Drag, Victoria Tonte, Nancy Scarantino, James Walker, Wendy Vogel, Lydia Dellasandro, Bonnie Spittel, Janice Spittel, Lucy Gontkowksi, Robert Skasko, James Masters, Dorothy Resavy, Kevin Goula, and Josephine Rizzo immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges; and WE WILL make them and David Williams whole for any losses they have incurred as a result of the discrimination against them, plus interest.

WE WILL remove from our files any reference to the unlawful discharges and layoffs and WE WILL notify the individuals unlawfully discharged or laid off that this has been done and that the discharges or layoffs will not be used against them in any way.

WE WILL, on request, bargain with the United Food and Commercial Workers, AFL–CIO, Local 72, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time and regular part-time production and maintenance employees employed at the Moosic, Pennsylvania facility but excluding all other employees including but not limited to, managerial employees, foremen, clerical employees, seasonal employees, casual employees, guards and supervisors as defined by the Act.

EDDYLEON CHOCOLATE COMPANY, INC.

Robert G. Levy, Esq. and *Timothy Brown, Esq.*, for the General Counsel.

Howard K. Truman, Esq., of Philadelphia, Pennsylvania, for the Respondent.

Peter V. Marks, Esq. (Kirschner, Walter & Willig), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. A hearing was held in this consolidated proceeding at Wilkes-Barre, Scranton, and Oliphant, Pennsylvania, on September 15–18, 29, 30, and October 27, 1987.

On December 27, 1985, the Petitioner-Charging Party (the Union) filed a petition in Case 4–RC–16121 and pursuant to a Certification Upon Consent Election issued by the Regional Director for Region 4 on February 19, 1986, an election by secret ballot was conducted on April 3, 1986, among the employees in an appropriate unit employed by Eddyleon Chocolate Company, Inc. (the Company or the Respondent). The tally of ballots showed 12 votes cast for the Union and 14 votes cast against the Union with 31 ballots challenged, sufficient in number to affect the results of the election.[1] The Union filed timely objections. On February 10, 1987, the Regional Director issued a report and recommendation on objections to election and challenged ballots which was adopted by the Board in its Decision and Order dated April 24, 1987. In his report, the Regional Director recommended that the objections and certain challenges be resolved on the basis of record testimony taken at a hearing.

Meanwhile the Union filed the following charges against the Respondent on the dates indicated: Case 4–CA–15535, January 13, 1986, amended April 16 and September 3, 1986; Case 4–CA–15636, February 26, 1986; Case 4–CA–15659, March 7, 1986; amended April 18, 1986; Case 4–CA–15716, April 4, 1986. The Region issued an order further consolidating cases, amended second consolidated complaint and notice of hearing on May 7, 1987,[2] which consolidated the representation case with the unfair labor practice cases for hearing. Respondent filed timely answers to all complaints, amended complaints, and consolidated complaints denying the commission of any unfair labor practices.

The complaint contains allegations of numerous violations of Section 8(a)(1) based on incidents occurring between November 1985 and September 1987[3] and allegations of discriminatorily motivated granting of wage increases and bonuses and layoffs and discharges in violation of Section 8(a)(1), (3), and (4) during the period November 1985–March 1986. The General Counsel seeks a bargaining order. The objections in the representation case and the allegations contained in the complaint are based on the same conduct to the extent the incidents giving rise to the alleged violations occurred during the critical period. There are also objections based on Respondent's election-day conduct.

All parties were represented at the hearing and were afforded full opportunity to be heard and present evidence and argument. All parties filed briefs. On the entire record, my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

[1] 1 The Intervenor, Candy and Confectionery Workers Union, Local 452 of Greater New York and Vicinity, AFL–CIO received 0 votes.

[2] Complaints had earlier issued in Case 4–CA–15535 on February 28, 1986; Case 4–CA–15636 on April 8, 1986; Cases 4–CA–15535, 4–CA–15636, and 4–CA–15659 (consolidated) on April 22, 1986; Case 4–CA–15535, 4–CA–15636, 4–CA–15659, and 4–CA–15716 (consolidated) on May 30, 1986.

[3] As amended at the hearing.

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and has been at all times material, a New York corporation with its principal place of business located in Moosic, Pennsylvania, where it is engaged in the manufacture of candy. Respondent admits that during the calendar year immediately preceding issuance of the complaint, in the course and conduct of its business aeration, it purchased and received goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. I find that Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Respondent established its plant in Moosic in 1984 and began production in August 1985.[4] On the afternoon of November 15, an agent of the Union, Daniel Scalzo, appeared in Respondent's parking lot and distributed union literature and authorization cards to Respondent's employees. At one point, Respondent's vide president and plant manager, Stanley Glasbrenner, approached the Union's agent, introduced himself, and asked the agent who he was. The agent, in turn, introduced himself and gave Glasbrenner copies of the material which he was distributing. Glasbrenner then told the agent that next time he was handbilling, he should do it at the gate.

On November 15, Respondent announced a layoff due to a ''slow down in current product demand.'' The announcement identified nine employees specifically as being laid off and stated that the layoff was a temporary one, to last 2 to 3 weeks. The announcement assured those named that they would be recalled ''as soon as the product demand establishes itself.'' This layoff is not alleged as discriminatorily motivated.

On November 20 Scalzo visited the home of employee Edward Zaleski where he obtained from him a signed authorization card. Scalzo had been distributing cards at the company gate earlier that day. Among the other employees who had obtained authorization cards from Scalzo that day were Becky Butler and Linda Seeley. The following day Butler and Seeley signed their cards and gave them to Zaleski.

The Events of November 22[5]

About lunchtime, on November 22, Scalzo and another union representative were parked on the street adjacent to the plant talking to Zaleski. At that point, Gilbert Shwom, president of the Company, drove up and asked Scalzo to identify himself. Scalzo told Shwom that he was a representative of the Union and was just talking to employees. Later that day, as Butler and Seeley were working at their machines, Shwom approached them and said that he had heard that they and

[4] Hereinafter all dates are in 1985 unless noted otherwise.

[5] Par. 5(a) of the complaint.

Zaleski were for the Union and that he wanted to know where they stood. He added that he knew that there had been union meetings at Zaleski's home and who had attended them. Butler and Seeley confessed that they had signed union cards because they were afraid of losing their jobs since they had heard rumors of layoffs. They denied, however, attending or knowing much about any meetings. Shwom then said that they did not have to worry about losing their jobs because he was putting them in for a raise December 1.

I find, in accordance with the allegations contained in paragraph 5(a) of the complaint, that Respondent, through Gilbert Shwom, on November 22, created the impression of surveillance,[6] promised employees a wage increase in order to discourage them from supporting the Union[7] and interrogated employees about their union sympathies,[8] all in violation of Section 8(a)(1) of the Act.

On November 22 also, the Company posted a notice stating that because of reduced sales demand the current layoff (November 15) would have to be expanded but that the layoff would be temporary and there would be a recall.

The Events of November 23

On November 23, Respondent posted two notices—one was the list of laid-off employees forecasted earlier,[9] the other was a notice entitled, ''Eddyleon Performance Record to Date.''[10]

The layoff notice listed 18 employees to be laid off immediately and was signed by Glasbrenner. A note at the bottom of the notice stated that the first recall to be made would be from this list. Zaleski's name was an the list. According to Shwom employees on the list were selected for layoff by their area supervisors.[11] He testified that the criteria used by the supervisors in determining who should be laid off included willingness to perform multiple jobs, absenteeism, tardiness, and ability to learn quickly. Shwom said that as of November 23, he did not know whether or not any employees on the list had engaged in union activity.

Of the 18 employees laid off on November 23, Ed Zaleski was the only one who had signed a union card prior thereto. Although employee John Zelinski, who was also laid off on November 23, testified that he had talked with Scalzo during a 10-minute break prior to November 23, there is no evidence that management was aware of this fact. Further, although John Zelinski testified that he handed out literature on breaks and during lunch hours, and talked to employees about forthcoming union meetings, there is no evidence that any of this activity occurred prior to his layoff in November. Since Zelinski was recalled on January 13, 1986, it is likely that he engaged in these activities after his recall.

On the afternoon of November 23, Butler and Seeley gave Fred Roy, head of the chocolate operation and an admitted supervisor, a ride home. During the journey, Butler and Seeley advised Roy that they were upset that Ed Zaleski had been laid off. Ray replied that Zaleski had gotten ''involved in something that he shouldn't have gotten involved with.''

I concluded that Zaleski was laid off because he was the principal, perhaps the sole, union activist known to the Respondent at the time of the November 23 layoff. I reach this conclusion based on the conversations that Shwom and Roy had with Butler and Seeley, which conversations reflect both knowledge and disapproval of Zaleski's protected activity.[12]

The Employee Committee[13]

The General Counsel alleges that the notice entitled, ''Eddyleon Performance Record to Date'' solicited employees to form a labor organization or committee'' in violation of Section 8(a)(1). Contrary to the allegation, however, the notice does not solicit the employees to form a committee but merely mentions one apparently already in existence.

Record evidence indicates that an employee committee was in existence and active in July 1985. The notice was clearly referring to that committee and was not soliciting the formation of a new committee in response to the advent of union activity as alleged in the complaint. I recommend dismissal of this allegation.

Solicitation of Applicant to Sign Document Stating she Would not Join a Union[14]

Jeanine Cicon had worked for Respondent briefly on two occasions prior to the incident here under discussion. In early December she visited the plant in order to get her check for work performed during the second period of her employment. While there, she was interviewed by Glasbrenner and Shwom for a job in Respondent's store. During the interview the following discussion took place:

> Shwom: We would like for you to sign a paper stating that you will not join a union or be affiliated with unions in any way.
>
> Cicon: Well, the unions have already come to me and I turned them down, so I'm not interested.
>
> Shwom [to Glasbrenner]: We'll have to see if this is legal, then we'll draw one up and have her sign it.
>
> Shwom [to Cicon]: You're hired.

Cicon began work the following day. She was never required to sign any such paper as the one under discussion and the subject was never again broached.

I find that the unlawful yellow dog contract was barely mentioned and that Cicon was never required to sign such a document and was hired on the spot without having to do so. I therefore recommend dismissal of this allegation.

The December 10 Threat of Layoff and Interrogation[15]

Employee David Williams stated in his affidavit[16] that on the afternoon of December 10[17] he was invited by Shwom

[6] *Wilco Business Forms*, 280 NLRB 1336 (1986); *Sierra Hospital Foundation*, 274 NLRB 427 (1985).

[7] *EDP Medical Computer Systems*, 284 NLRB 1232 (1987).

[8] *Florida Steel Corp*., 224 NLRB 587 (1976).

[9] Pars. 11 and 12 of the complaint.

[10] Par. 7 of the complaint.

[11] Bonnie Supinski, supervisor of the woman up front; Wayne Stueck, supervisor of maintenance; Fred Roy, supervisor of the chocolate department; and George Marsden, supervisor of the shipping department.

[12] Respondent failed to show that Zaleski, rather than some other employee, would have ben laid off, even in the absence of his union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[13] Par. 7 of the complaint.

[14] Par. 5(c) of the complaint.

[15] Par. 5(b) of the complaint.

[16] David C. Williams supplied an affidavit to the Board during the investigation of this case. He died prior to the hearing. His affidavit was received into evidence.

[17] By December 10, the Union had obtained 20 signed authorization cards.

into Glasbrenner's office where Shwom told him that it was rumored that Williams was a union organizer. Williams denied any complicity. Shwom then said, ''Dave, you should have technically been on layoff, but Wayne[18] speaks highly of you and said that he needs you.'' Williams said okay and left. Before Williams left, however, Shwom told him that there were also rumors that Jim Masters, John Davis, and Bill Gnall were also involved with the Union.

I find that Shwom's statement was not a threat but was interrogation. *Gates Air Conditioning*, 199 NLRB 1101 (1972).

The December 12 Notice of Discharge[19]

On December 12, Respondent issued a notice to the effect that the employees who had been laid off November 15 and 23 were terminated because there was no probability that there was going to be a recall in the foreseeable future. The notice stated that the status of the employees was converted from ''layoff'' to ''permanent discharge'' in order to permit those employees previously in layoff status to feel free to seek other employment. The notice did, however, state that Respondent would maintain a file of previously employed employees and would contact them should future employment become available.

The complaint alleges that the December 12 conversion of the November 23 layoffs to permanent discharges was discriminatorily motivated. The Respondent avers that the conversion was motivated by humanitarian considerations forced on it by economic circumstances. More specifically Respondent asserts that by December it was clear that recall was unlikely because sales had diminished in November and it seemed unfair to keep the laid-off employees waiting and hoping for recall under the circumstances. Respondent's position is supported by documentation reflecting a drop in sales in November.

With respect to the General Counsel's allegation of discriminatory motivation, the record indicates that as of the original November 23 layoff, eight employees had signed authorization cards, six of them solicited by Ed Zaleski, the other two by Scalso. Though Shwom was aware that Zaleski had solicited Butler and Seeley to sign cards, he chose to lay off only Zaleski and to continue to employ the card signers. Either management did not know of the other five card signers or chose to keep them on the payroll despite their having signed cards.

The record indicates that during the week ending December 13, Respondent had just under 80 rank-and-file employees on its payroll, including the 18 laid off on November 23. After November 23, up to December 12, inclusive, 16 more individuals signed authorization cards. Of these 16 additional card signers, 6 of them were signed up by Scalzo, at their homes, several days after they had been laid off on November 23. Ten of them were still employed at the plant on December 12 when Respondent notified the laid-off employees that their layoffs had been converted to discharges. Thus, a majority of individuals who signed cards between November 23 and December 12 were retained. Further, of the 27 laid-off employees[20] whose status was changed to ''discharged on December 12, only 10 were card signers. Finally, of the total of 24 individuals who signed cards from the beginning of the union drive through December 12, there is evidence that Respondent was aware or suspicious of only 7 of them, i.e., Zaleski, Seeley, Becker, Williams, Masters, Davis, and Gnall. Of these seven, only Zaleski was laid off. The other six were kept working. From these figures, I conclude that Respondent's management, as of December 12,[21] was unaware of the names of most of the union activists and except for Zaleski chose to take no action against individuals it knew or suspected of being engaged in union activities. In short, I recommend dismissal of paragraphs 11(a) and (b), and 12 of the complaint except as to Zaleski, where I find that the conversion of his November 23 layoff on December 12 to permanent discharge was violative of Section 8(a)(1) and (3).

The December 12 letter to employees was not a notice of permanent discharge despite the unartful inclusion of this terminology in the letter. It was, rather, an advisory to those employees who were previously laid off for the short term that the layoff would be longer or perhaps indefinite and that the employees should feel free to take other employment. However, the record is clear that management was fully aware that its business was seasonal and that when orders were received for the Passover and Easter seasons these experienced employees would be contacted. The employees were so advised. In fact, within 8 to 10 weeks a large number of the laid-off employees were physically back on the job.

Wage Increases and Bonuses[22]

On August 30 and November 23, Respondent issued memoranda to employees enumerating the various benefits being received by employees at the time and in the past. Neither document mentioned across-the-board semiannual wage increases or Christmas bonuses as existing benefits.

On December 17 Respondent issued a memorandum entitled ''There's Good News.'' In this memorandum Respondent announced to its employees that they would receive a new wage increase in the forthcoming week's paycheck; that there would be a wage review every 6 months with a guaranteed minimum increase of 15 cents per hour for all employees; that they would receive an additional paid holiday; that Respondent was ''finalizing'' a *new* major medical program; that starting in September 1986 Respondent would initiate a new employee profit-sharing plan and; that the employees would all receive Christmas bonuses. As promised, the employees all received wage increases, effective December 13 and all likewise received Christmas bonuses.

The complaint alleges that the promises contained in the December 17 memorandum were designed to discourage Respondent's employees from supporting the Union in violation of Section 8(a)(1) and that the granting of the wage increases and bonuses had the same purpose and was in violation of Section 8(a)(1) and (3). Respondent takes the position that pay raises and bonuses had historically been granted immediately before Christmas and that since it was merely following this tradition, there was no violation. Similarly, Respondent argues that the issuance of the December 17 memo-

[18] Wayne Stueck, Williams' supervisor.

[19] Pars. 11(a) and (b) and 12 of the complaint.

[20] Nine laid off on November 15 plus 18 who were laid off on November 23.

[21] At the time, no petition had been filed.

[22] Pars. 8 and 9 of the complaint.

randum did not violate the Act since the announcement of the forthcoming wage increases and bonuses were consistent with tradition and the promise of the additional holiday (Friday after Thanksgiving) was ''foreshadowed'' by an earlier (August 30) memorandum. Likewise, Respondent argues that it had previously promised ''to smooth out employee problems with major medical'' and had announced a contemplated pension or profit-sharing plan prior to December 17, in its November 23 memorandum.

With regard to the various promises here described and the granting of wage increases and bonuses during the union organizing campaign, I find the acts to have been designed to undermine the Union's campaign. The timing of the promises, outlined in the Company's August 23 and 30 memoranda occurred 3 days and 10 days respectively, after the Union's overt organizing began, was clearly designed to induce the employees to refrain from supporting or joining the Union, and was therefore violative of Section 8(a)(1) of the Act.[23] The granting of the bonuses[24] and the wage increases[25] for the same purposes was also violative of Section 8(a)(1). Respondent's defense that bonuses and wage increases at this time of the year were traditional is rejected in the absence of documentation. Surely, if there were, in fact, a tradition of granting Christmas bonuses and wage increases at this time of the year, Respondent would have had documentation to support its position. Inasmuch as Respondent did not offer supporting documentation, it is clear that none exists.[26]

December 17 Interrogation[27]

On December 17 Glasbrenner motioned to David Williams to come over to where he was standing at the rear of line 92.[28] when Williams walked over to Glasbrenner, the latter said, ''Dave, this is the second time I heard that you're involved with the Union.'' Williams denied involvement and demanded the names of his accusers. Glasbrenner refused to give Williams any names. The discussion ended when Williams walked away.

Although Glasbrenner's statement was declarative in form rather than interrogative, it was clearly intended to elicit an explanation as to the truth or falsity of the rumor concerning Williams' involvement with the Union. I find, under the circumstances, in light of other violations, that Glasbrenner's statement constituted interrogation and, as such, was a violation of Section 8(a)(1) of the Act.[29]

December 19 Surveillance[30]

Respondent's property is connected to the public highway by a bridge which Shwom understood to be company-owned. On the afternoon of December 19, at shift change, Scalzo showed up on the bridge distributing handbills to Respondent's employees. Shwom drove up and parked the car on the street near the bridge and sat there for about 10 minutes.[31] He then drove the car across the bridge and parked again, directly across from the entrance to the Company's parking lot about 15 feet from Scalzo. Shwom remained in his car talking on his car phone, watching Scalzo and employees as they came out of the plant. Scalzo then got into his car to leave and Shwom drove into the company parking lot.

The General Counsel alleges that Shwom, by the above-described behavior, engaged in surveillance in violation of Section 8(a)(1). Respondent denies any violation.

I find no violation here and recommend dismissal of the allegation. The Board has long held that union representatives and employees who choose to openly engage in union activities at the employer's premises have no cause to complain that management observes them.[32] The observation by Shwom of the distribution of union literature by Scalzo in front of Respondent's premises does not constitute unlawful surveillance.[33]

Let's Clear the Air[34]

On December 20 Respondent issued a memorandum entitled ''Lets Clear the Air.'' The General Counsel alleges that this memo ''solicited employees to form 'a committee that will discuss everything, from pay rates to vacation, from hospitalization to hours of work.'''

The record indicates, as previously noted, however, that the committee under discussion had already been in existence long before the appearance on the scene of the Union. I find that Respondent, in this memo, was merely drawing attention to the committee and reminding the employees that they were permitted the privilege of its use for the purposes discussed. I recommend dismissal of the allegation.

The Events of Late December[35]

On December 23 the Union demanded recognition and on December 27 it filed the petition in Case 4–RC–16121, supported by at least 30 signed authorization cards. Following the filing of the petition, additional signatures on authorization cards were obtained.

Peter Zelinski, an early card signer and union activist, in late December, was engaged in soliciting membership for the Union and distributing union literature. One day around Christmastime, Glasbrenner asked Zelinski if he had been passing out union literature. Zelinski admitted that he had been so engaged, but only on his own time, during lunch periods or on breaks. Glasbrenner asked Zelinski to stop. Zelinski replied that during his own time he would pass out union literature or anything else that he wanted. Glasbrenner then told Zelinski that if he did not stop distributing union literature he would take drastic measures.

I find that, by Glasbrenner interrogating Peter Zelinski concerning his distribution of authorization cards or other lit-

[23] *Oakes Machine Corp*., 288 NLRB 456 (1988).

[24] *Machine Tool & Gear*, 237 NLRB 1109 (1978), affd. 652 F.2d 596 (6th Cir. 1980).

[25] *Leisure Time Tours*, 258 NLRB 986 (1981); affd. mem. 688 F.2d 823 (3d Cir. 1982).

[26] *Reno Hilton*, 282 NLRB 819 (1987).

[27] Par. 6(a) of the complaint.

[28] Williams' affidavit.

[29] *Gates Air Conditioning*, supra.

[30] Allegation 5(d) of the complaint.

[31] At same point Shwom asked Scalzo to get off the bridge and Scalzo refused.

[32] *EDP Medical Computer Systems*, supra, citing *Milco*, 159 NLRB 812 (1966), affd. 388 F.2d 133 (2d Cir. 1968); *Emenee Accessories*, 267 NLRB 1344 (1983).

[33] *EDP*, supra, citing *Emenee*, supra; *R. H. Macy & Co*., 267 NLRB 177 (1983); and *Palby Lingerie*, 252 NLRB 176 (1980).

[34] Allegation 6(b) the complaint.

[35] This incident, par. 6(d) of the complaint, is alleged to have occurred on January 15, 1986. But Zelinski testified as the incident is described in the text, that it occurred around Christmastime.

erature on his own time and threatening to take drastic measures against him if he continued, Respondent violated Section 8(a)(1) of the Act.[36]

The Events of Mid-January 1986[37]

Employee James Walker was at the plant one day in mid-January engaged in performing his assigned duties when he was called to one side by Glasbrenner to talk in private. On this occasion, Glasbrenner asked Walker what he and the other employees wanted, regardless of whether or not there was a union. Walker replied that they wanted job security, better wages, a better health plan, and more sick leave. The record indicates that Glasbrenner had made similar inquiries in the past, long before the advent of the Union.[38]

The General Counsel alleges that the above-described conversation was a solicitation of grievances and complaints by Respondent from its employee and therefore an implied promise of improved terms and conditions of employment. In view of the surrounding circumstances—the granting of wage increases and bonuses and the promises of benefits during the union organizing campaign—I find Glasbrenner's solicitation of grievances violative of the Act.[39]

The January 20 Meeting[40]

Despite Glasbrenner's earlier warning, Peter Zelinski continued to distribute union literature well into January. Shwom learned of Zelinski's activity and called a meeting of certain employees and management personnel in his office, including Zelinski. Shwom opened the meeting by asking the employees present what their gripes were. Some replied that job security and wages were problems. Shwom replied that he was trying to do his best, to give the employees greater benefits and better working conditions.

Shwom then said that he knew that Pete Zelinski was handing out union papers and authorization cards and asked Zelinski if he was involved in such activity. Zelinski acknowledged that he had, indeed, been involved in the distribution of union literature but only on his own time. Shwom asked Zelinski if he would stop such activity but Zelinski replied that he would do what he wanted to do on his own time. Shwom then asked Zelinski if he would pass out the Company's literature but Zelinski refused. Shwom told Zelinski that he would issue him a verbal warning, then a written warning, then terminate him if he refused to distribute the Company's literature. Zelinski then agreed to do so if it was on company time.

Shwom, during this meeting, also advised those present that he did not want the Union representing the employees, that he wanted his ''own house union.'' He mentioned that there had been layoffs in the past, that business was slow, and that there would be layoffs in the future. He said, however, that Zaleski had been laid off because ''he had involvements with other people whom he did not really want to associate with.''

As to the future, Shwom stated that he would try to start a profit-sharing plan and a pension plan in September and a new insurance plan with increased benefits. On the other hand, he also said that he did not want a union at Eddyleon and ''would do anything in his power to not have one there.'' He said that he could close down his business and start elsewhere, that he had done it before. He added that if a union ever got in, production would be cut, which meant there would be layoffs and no overtime.

The General Counsel alleges, and I agree, that Respondent, by these acts, violated Section 8(a)(1) when Shwom stated that he knew that Pete Zelinski had been distributing union literature and asked him if it were true;[41] when he threatened Zelinski with a verbal warning, written warning and termination if he refused to distribute Respondent's literature;[42] when he promised better benefits and insurance in order to discourage the employees from supporting the Union;[43] when he asked employees what their gripes were and, after being told, replied that he was doing his best to give them greater benefits and better working conditions;[44] when he solicited employees to form a ''house union'';[45] and when he threatened that he would do anything to keep the Union out and threatened to close down his business and start elsewhere.[46]

The Termination of David Williams[47]

David Williams was an employee who had signed a card in early December and attended two union meetings. He had, as noted earlier, been accused by management on two occasions of being involved with the Union. He was a maintenance man specializing in refrigeration.

On Monday morning, February 3, Williams and worker Jim Masters reported to work on time. They began working on an air-conditioning repair job. While they were so engaged, Shwom approached and told them that after they were done, they were needed in the factory on the production line. They replied, ''no problem.'' Five minutes later, however, Williams complained to his supervisor, Wayne Stueck, that he was not feeling well. Stueck gave him permission to go home.

Stueck advised Shwom that Williams had gone home sick. Shwom then told Stueck that since it was a two-man job to repair the air-conditioning and Williams had gone home sick, Jim Masters should be sent to work on the production line. Ten minutes later, Masters also went home sick.

Williams and Masters had punched out before 9 a.m. to go home. Both live within a few blocks of the factory. At 11 a.m., management called both their homes and neither was home. Later that day, Shwom, apparently suspicious, sent letters to Williams and Masters recounting the events of

[36] *E.R. Carpenter Co.*, 284 NLRB 273 (1987).

[37] Par. 6(c) of complaint. Hereinafter, all dates are in 1986 unless noted otherwise.

[38] Where members of management merely continue, throughout an organizing campaign, a longstanding practice of asking employees informally what could be done to improve plant operations, there is no violation in the absence of any explicit promise to correct inadequacies. *Gossen Co.*, 254 NLRB 339 (1981), modified 719 F.2d 1354 (7th Cir. 1983). In the instant case, however, although Glasbrenner made no explicit promises during this conversation, Respondent, during the organizational campaign, did grant wage increases and bonuses and also promised other benefits. I therefore find the *Gossen* case inapposite.

[39] *Color Tech Corp.*, 286 NLRB 476 (1987).

[40] Par. 5(e) of the complaint.

[41] *Wilco Business Forms*, supra.

[42] *Ona Corp.*, 261 NLRB 1378 (1982), modified 729 F.2d 713 (11th Cir. 1984).

[43] *EDP Medical Computer Systems*, supra.

[44] *Color Tech Corp.*, supra.

[45] *Bay State Ambulance Rental*, 280 NLRB 1079 (1986).

[46] *Churchill's Supermarkets*, 285 NLRB 138 (1987).

[47] Par. 13 of the complaint.

that morning and stating, ''We will require a doctor's excuse or we will accept a resignation from the company, by both men.''

According to Williams' affidavit, he was out sick with the flu Tuesday and Wednesday. On Wednesday, February 5, he received Shwom's letter. On Thursday, he returned to work with a doctor's excuse which stated that Williams was under the doctor's care from February 3 through 5 and unable to work. The excuse also stated, ''light duty suggested for balance of the week.'' Williams worked all day Thursday.

On Friday morning, February 7, Stueck ordered Williams and the rest of the maintenance employees to stop what they were doing to go out and work on the production lines. Williams was assigned the job of demolding, i.e., dumping chocolate bars out of their molds. Since, according to his affidavit, he was still feeling sick from the flu, he told Mike Hyduchok, the man for whom he was working, that he was not up to performing the task. Hyduchok told Williams to go see if Stueck would assign him another job. Williams then went to Stueck and told him that he ''couldn't do the work,''[48] ''couldn't do that job''[49] or ''wasn't going to do that job.''[50] Williams did not say that he was ill or explain why he could not do the job. Stueck became angry and said, ''I'm sick and tired of all you guys' shit, punch out.''[51] Williams walked away.

As Williams was walking back toward the maintenance area before punching out, he met the vice president of the Company, George Marsden, and told him that he was sick and was going home. Marsden said that that was alright. Williams then went to warm up his truck preparatory to leaving. As he stood inside the plant waiting for his truck to warm up, Stueck came by and asked him what he was doing there. Williams explained that he was waiting for his truck to warm up, that it was snowing, nasty, and he was going home because he was sick. Stueck said, ''No, you're not going home because you're sick; you're going home because you didn't do the job I told you to do.'' Williams then left.

The General Counsel called several witnesses who described Williams' appearance that day as indicating serious illness. Stueck, however, testified that Williams was not ill. Whether or not Williams refused to perform his assigned task because he was ill or because he simply did not want to do it is uncertain. I am satisfied, however, that Stueck honestly believed that Williams was insubordinate. The events of the previous few days warranted such a conclusion. Williams' termination, I find, was based on this incident alone and had nothing to do with his union activity. I recommend dismissal of this allegation.

The Events of February 14[52]

Respondent's shipping and receiving department was manned by four individuals—George Marden, salaried, brought with a few experienced employees from Brooklyn, New York, and admittedly a supervisor; Daniel Evancho, hourly paid at $7.50 per hour, employed by Respondent since 1978 and also brought from Brooklyn, New York, to Moosic; Joe Manley, hourly paid at $5.35 per hour; and John Zelinski, hourly paid at $4.75 per hour.

Marsden, at relevant times, was in charge of inventory control. He knew what was in stock and each morning would determine which orders had to be shipped out and what had to be produced for preparation for shipping at a later date. He kept track of everything received and prepared bills of lading for shipments. After making these determinations Marsden would inform Evancho what orders were to be filled and shipped. Evancho would then take the orders and he, Manley and John Zelinski would prepare the various orders for shipment. Evancho, being more experienced, instructed Manley and Zelinski on how to put the orders together and place them on skids. Though Evancho sometimes worked side by side with Manley and Zelinski, he often stayed in the office most of the day after giving the other two their orders. What he did while in the office is not clear from the record.

John Zelinski testified that, on occasion, Evancho would have problems with the way Zelinski performed the tasks which Evancho had brought him to do. When this occurred, Evancho did not attempt to discipline Zelinski himself but would call Marsden down and he would straighten out the problem. Zelinski never received any written reprimands on these occasions but he was told by Marsden that he should do what Evancho tells him to do.

On February 14, after Zelinski had been recalled to work as a janitor and was no longer working in the shipping and receiving department, Evancho asked Zelinski to help him unload a truck. Zelinski replied that he could not do so because he had to leave early to testify at the NLRB hearing. Later, Evancho asked Zelinski why he was going to testify. Zelinski replied that he had been subpoenaed to testify. Evancho then said, ''I hope you have a job when you come back.'' Zelinski assured Evancho, ''I'll have a job. I'm not worried about that.'' Evancho laughed and said, ''You want to bet?'' Zelinski and several other employees went to the hearing and returned to work without incident.

The General Counsel takes the position that Evancho is a supervisor under the Act and that his statement to Zelinski was a threat which was violative of Section 8(a)(1) of the Act. I find, however, that Evancho's duties did not include any of the supervisory indicia and that the directions which he gave to the other employees in the shipping department involved nothing more than the routine assignment of works to less-experienced employees by a more experienced employee. He is therefore not a supervisor within the meaning of the Act.[53] Moreover, the record clearly indicates that if, indeed, Evancho were found to be a supervisor, then the shipping department would be comprised of two supervisors and two rank-and-file employees, an unlikely ratio. Since the Board has held that it will look to the ratio between supervisors and employees in determining the supervisory status of an employee,[54] I do so here. I find that the evidence does not support the General Counsel on this point; that Evancho is not a supervisor and that whatever he said on this occasion cannot be attributed to the Respondent; and that there was no violation of the Act with regard to this incident. I rec-

[48] According to Williams.

[49] According to employee John Davis.

[50] According to Stueck.

[51] The incident is related as it appears in Williams' affidavit. John Davis testified similarly in support of Williams' sworn testimony.

[52] Par. 10 of the complaint.

[53] *Gem Urethane Corp.*, 284 NLRB 1349 (1987).

[54] *Great Lakes Oriental Products*, 283 NLRB 99 (1987); *Monarch Federal Savings & Loan Assn.*, 237 NLRB 844 (1979); enfd. 620 F.2d 289 (3d Cir. 1980).

ommend that the allegation oontained in paragraph 10 of the complaint be dismissed.

Also on February 14, Marsden called John and Peter Zelinski, John Davis, and William Gnall into his office about 10:15 a.m. Marsden asked them if they were going to the hearing later that day. They replied that they were. He then said that he would appreciate it if they would not all go at once since they were key people and were needed in the plant. He suggested that only one of them go down initially and, if more testimony were needed, that the others be sent down later. The employees insisted that they all go down together and Marsden acquiesced. As now, they all went to the hearing but since a consent election agreement was reached, no one testified, and they returned to work without incident.

The Discharge of John Zelinski[55]

In January the initial charge was filed in Case 4–CA–15535 alleging among other things the discriminatory termination of employees. Toward the end of January, Respondent began recalling certain employees including some card signers. John Zelinski, who had worked in the shipping and receiving department from August to November was recalled on January 13 to work as a janitor to replace the regular janitor who had resigned.

On February 25, at about 7:30 a.m., Marsden called John Zelinski into his office and asked him if he would accept a position back in shipping and receiving. Zelinski said that he would and Marsden told him to get Rocco Onorati, an employee then working in shipping and receiving. Zelinski found Onorati and brought him back to Marsden's office where Marsden asked Onorati if he would accept the janitor's job and Onorati agreed to do so.[56]

The exchange of jobs, having been agreed on, Marsden asked Zelinski to show Onorati what his new janitorial duties would be. Zelinski complied and showed Onorati what to do. However, while doing so, Zelinski suddenly remembered that as janitor he was receiving $15 to $20 in overtime which he would not get back in shipping and receiving where overtime was not available.[57] He went back to Marsden's office late that afternoon and asked him if he was going to get a raise, explaining that the loss of overtime would make the transfer unacceptable unless he obtained a wage increase. Marsden said he would look into it and get back to Zelinski.

The next morning, February 26, when Zelinski arrived at work, he did not report to the shipping and receiving department but began performing janitorial duties instead. When Marsden arrived, he asked Zelinski why he had not reported to shipping. Zelinski asked if he was getting a raise. Marsden said that he had not had time to look into it yet and asked Zelinski to report to shipping. Zelinski replied that he would not go to shipping unless he knew right then and there that he would receive a raise. An argument ensued with Marsden insisting that Zelinski report to shipping while he looked into the requested raise, and Zelinski refusing to report unless he were immediately promised a wage increase. Expletives were exchanged and Marsden fired Zelinski.

The complaint alleges that Respondent discharged Zelinski because of his activities on behalf of the Union and because he appeared for the purpose of giving testimony at a Board hearing scheduled for February 14. I find, however, that Zelinski was terminated because he refused on February 26 to report to the shipping department as he had agreed to do the day before. I therefore recommend dismissal of this allegation.[58]

The Mid-March Interrogation; Impression of Surveillance[59]

One day in mid-March, Shwom called employee James Masters into his office. Once alone, Shwom asked Masters how he felt about the Union. Masters replied that he was not sure. Shwom stated that he would not tolerate a union; that it was his company; and he would operate the way he wanted to operate. He added that he knew that Masters was active in the Union. Masters replied that if attending two union meetings was being active, then he was active. Shwom asked Masters what he thought the Union could do for him and Masters answered that if nothing else, he would have seniority rights, considering he was one of the first employees hired. He suggested that Shwom put up a seniority list and lay off according to seniority but Shwom said that as long as Masters was doing his job satisfactorily, he had nothing to worry about, and so long as anyone was a good worker, he would not have to worry about his job. At some point during this conversation, Shwom stated that he knew who had attended union meetings and was not very happy with them.

The General Counsel takes the position that Shwom's questioning of Masters on this occasion amounted to unlawful interrogation and his statement concerning his knowledge of which employees attended union meetings created an impression of surveillance in violation of Section 8(a)(1). I find the General Counsel's allegations of unlawful interrogation[60] and the creation of the impression of surveillance[61] on this occasion meritorious.

The March 17 Interrogation and Promise of a Wage Increase[62]

On the morning of March 17 employee Robert Skasko was called into Shwom's office. When he arrived, Shwom said that he had heard that Skasko had attended a meeting the night before at Terry's Diner. Skasko had, in fact, attended the union meeting as charged and freely admitted it to Shwom. Shwom asked Skasko why he attended such meetings,[63] and pled, ''I didn't do nothing to you. I gave you a job.'' Skasko replied that he just wanted to hear Scalzo's side of the story but added that Shwom had promised him more pay but had not kept his promise. Shwom said that as soon as the Company began to make more money, Skasko would get a raise.

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[55] Allegation 12 of the complaint.

[56] Marsden had learned that Onorati was illiterate and was having trouble performing certain duties in shipping and receiving. He determined that John Zelinski, with his experience, could do the shipping and receiving work and Onorati would then be able to perform the janitorial duties.

[57] Both jobs paid $4.75 per hour.

[58] In further support of this conclusion the record indicates that Shwom made affirmative efforts to get Marsden to reconsider his decision to terminate John Zelinski.

[59] Allegations 5(f), (j), and (k) of the complaint. Allegations 5(j) and (k) are identical.

[60] *Florida Steel Corp.*, supra.

[61] *Welco Business Forms*, supra; *Sierra Hospital Foundation*, supra.

[62] Allegations 5(f), (g), and (i) of the complaint.

[63] Other portions of this conversation will be considered infra.

The General Counsel alleges that this conversation was both unlawful interrogation and a promise of a wage increase made to an employee to induce him not to support the Union. I find these allegations meritorious.[64]

According to Skasko, during this conversation Shwom asked him how many employees had attended the union meeting at Terry's Diner and Skasko replied 20 or 22. Shwom then asked for the names of those present and Skasko named in addition to himself, Peter and John Zelinski, Dorothy Resavy, Wendy Vogel, Vicky Tone, Nancy Scarantino, and Kevin Goula. As Skasko mentioned each employee's name, Shwom checked it off a list. Skasko testified that within 9 or 10 days each employee he had named, including himself, was laid off. Skasko is credited.

I find that Shwom questioned Skasko as to the number and identity of employees that attended the union meeting. By doing so, Respondent violated Section 8(a)(1) of the Act.[65]

The Events of March 19[66]

On March 19 Shwom saw Scalzo, Chorpenning,[67] John Zelinski, and David Williams on the bridge leading from the highway to his parking lot, handing cut union leaflets to his employees leaving the plant. Shwom was under the mistaken impression that the bridge was part of his property so he told Scalzo to get off. Scalzo refused, stating that he had a town map which indicated that he had a right to be there. At the time, several employees were present in their cars in the process of leaving the plant parking lot. When Scalzo refused to leave, Schwom threatened to call the police and did so.

As the employees passed by, Scalzo and Chorpenning tried to give them handbills through their car windows. As they did so, Shwom started screaming, ''Give him one, give her one, they're union supporters'' as he pointed to various employees—Nadine Kosierowski, Bonnie Spittel, Lucy Gontkowski, Janice Spittel, Dan Evancho, Bob Skasko, Dorothy Resavy, Marryanne Reggie, and others. At this point Scalzo advised shwom that he was committing an unfair labor practice. Shwom replied, ''Go ahead, file charges. I don't give a damn about the goddamn Labor Board. I have a good attorney and lots of money.'' Shwom then said that he knew how to get rid of the Union, that he had talked to Elmer Hawk[68] about it and Hawk had told him how it was done.

Scalzo, at this point, asked Shwom why he had treated his employees so rotten, laying them off without regard to seniority. Shwom responded that he did not have seniority; had not recognized a union yet; and was going to lay off another ''pile of their [the Union's] friends'' the next day. When Scalzo admonished Shwom by stating that it was not right for him to do that, Shwom said that he could do anything he wanted to do; that he would not have a union that he did not want; that he would close the plant down if he had to, or sell it to keep the Union out. The police arrived and the disputants voluntarily separated.

With respect to this incident the General Counsel alleges 8(a)(1) surveillance and threats of plant closure and layoffs. I find that, with regard to the allegation of surveillance, for reasons stated supra, management was free to observe those union activities which its employees and the Union chose to make public.[69] I recommend dismissal of paragraph 5(h) of the complaint. With regard to Shwom's threat to lay off another pile of the Union's friends the next day, made in the presence of his employees, I find that, although the statement was made in anticipation of a planned economic layoff, the linkage of the threat of layoff with the term ''your [the Union's] friends'' intimated that the employees were being laid off because they were friends of the Union and was therefore coercive.[70] The threat to close the plant is, of course, violative in this context.

The March Layoffs[71]

On March 21 Respondent laid off 14 employees; on March 24, 1 more; on March 27, 20 more; and on March 31, 1 more. Of these 36 laid-off employees, the complaint alleges that 16 of them were laid off for discriminatory reasons. Of the 16 alleged discriminatees, 10 of them had been identified as union supporters either by Shwom, himself, during the incident on the bridge on March 19 or by Skasko to Shwom during their March 17 conversation.

On the other hand, of the 36 employees laid off by Respondent, between March 21 and 31, about half of them were neither card signers nor otherwise engaged in union activities. Moreover, a large number of card signers and union activists were either not laid off at all or were recalled. This includes several who were definitely known to Shwom as union activists.

The General Counsel alleges that Respondent laid off certain employees on March 21 and 27 because they were active on behalf of the Union. Respondent contends, however, that the layoffs, by number, were economically motivated, and by specific choice, were value motivated.[72]

In analyzing the record I conclude that the Respondent's business was, and is, seasonal in nature; that the heavy sales occurred in February and early March and trailed off drastically in late March and April; and that the decision to lay off large numbers of employees was economically motivated. Though a number of employees had been active for the Union back in November and December 1985 and January 1986[73] and management had been aware of these activities at the time, management did not terminal them. Rather, these union activists were kept on the payroll until economic necessity required their terminations along with those of nonactivists.

Although the complaint alleges the March 21 and 27 layoffs of certain employees as discriminatorily motivated, it

[64] *Dresser Industries*, 231 NLRB 591 (1977), enfd. mem. 580 F.2d 1053 (9th Cir. 1978); *Pony Express Courier Corp.*, 283 NLRB 868 (1987); *EDP Medical Computer Systems*, supra.

[65] *L & J Equipment Co.*, 272 NLRB 652 (1984).

[66] Allegations 5(h), (m), and (n) of the complaint.

[67] Another union organizer.

[68] Owner of a nearby nonunion chocolate company.

[69] *EDP Medical Computer Systems*, supra.

[70] *Yellowstone Plumbing*, 286 NLRB 993 (1987). It is a violation of the Act for an employer to falsely blame a union's organizing campaign for economic problems redounding to the disadvantage of its employees. *Sunbeam Corp.*, 287 NLRB 996 (1987).

[71] Par. 14 of the complaint.

[72] Respondent contends that when economic layoffs became necessary, it chose for layoff those employees who would not or could not do more than one kind of job; who had a bad absentee or tardiness record; or who were slow in learning.

[73] See incidents involving Pete Zelinski, James Walker, and others, discussed supra.

does not allege that the layoffs of April 9, 18, and 23 which followed a similar pattern were so motivated. Indeed, several of the alleged discriminatees terminated in March were temporarily recalled only to be laid off again in April as the total complement dropped to a mere six or seven for the summer months. In the fall when business again picked up, many employees including several union activists were recalled. In short, I see no general pattern of discrimination and recommend dismissal of this allegation.

The Events of September 2, 1987[74]

On or about September 2, 1987, Shwom called employee Robert Skasko into his office. He showed Skasko a subpoena and told him that he, Shwom, had to be in court on September 15. Skasko replied that he had to be there also on that date. He told Shwom that he had never before been in a courtroom, wanted to know what was going on, and asked Shwom if he could clear up the matter. Shwom explained the procedure then suddenly asked Skasko, ''Did you give any names?'' Skasko replied that he had not. Shwom continued, ''If you did give any names; if you're on that stand, you don't know, you don't remember.''

Clearly, Board law supports the General Counsel's position that interrogation of an employee as to the information he might have given to a Board agent investigating an unfair labor practice charge is violative of Section 8(a)(1) of the Act and I so find.[75] Similarly, Shwom's attempt to interfere with Skasko's duty to truthfully testify at the forthcoming hearing is likewise violative.[76]

Case 4–RC–16121

Objections

To the extent I have found allegations of unfair labor practices during the critical period meritorious, I likewise find the objections on which they are based, meritorious. In addition to these objections, however, there remain to be considered Objections 10 and 11 which allege that Respondent used a plant supervisor as a company observer during the election and that the employer and his plant supervisors were standing in the hallway staring at employees as they came in and lined up to vote.

The first of these two objections is based on record evidence which indicates, according to the testimony of Daniel Scalzo, that a preelection conference was held on the day of the election and that this conference was attended by the union observer, Shwom, Shwom's brother, the Board's agent, Timothy Brown, Scalzo, and one Ran Becker. Scalzo testified that Shwom, at this time, advised Scalzo that Becker would be the Respondent's observer at the election. Scalzo then advised Brown that Becker was a supervisor. Brown then asked Becker if he was a supervisor and whether he had authority to hire and fire people. Becker replied affirmatively to all three questions. Brown then told Shwom that if Becker were appointed the Respondent's observer, the Union would file objections. Shwom, after asking for a minute to consider the situation, then announced that he would use one of the secretaries as his observer in place of Becker.

As Shwom was explaining to the secretary what her duties would be as observer, the Respondent's attorney came in. Shwom and his attorney then conferred in the hall after which they returned and announced that they would use Becker as the observer and that the Union could do whatever it wanted. Becker served as Respondent's observer and as already noted, the Union filed its objection.

During the hearing, Respondent objected to the admission of Scalzo's testimony and moved to strike on grounds that it was hearsay. I ruled that the testimony would remain in the record, with the hearsay portions thereof given proper weight depending on whatever corroborating evidence might subsequently be adduced.[77]

At the hearing neither the Charging Party nor the Respondent[78] called Becker to the stand to either confirm or deny that the alleged discussion had taken place or to testify concerning his duties as an employee of Respondent. Neither were any of the other witnesses to the alleged discussion called to testify on the matter. Although Shwom was recalled to the stand to testify shortly after Scalzo, he was not examined by any of the parties as to either the preelection conference or as to Becker's alleged supervisory duties or the lack thereof. Indeed, if he had, and had denied Becker's alleged supervisory status, it might have been easier to recommend that the objection be overruled.[79] As it stands, Shwom's failure to testify might give rise to an inference that he could not honestly deny Becker's supervisory status but for the fact that there is nothing in the record to rebut except hearsay. I therefore draw no inference from Respondent's failure to examine Shwom on the subject of Becker's alleged supervisory status.

Though the Charging Party did not call Becker to the stand, it did examine two rank-and-file employees concerning Becker's status. Employee Kevin Goula identified Becker simply as ''a worker there.'' When asked about Becker's duties, Goula testified that he did not know. Goula also testified that whereas he wore a workshirt and workpants, Becker wore a dress shirt, pants, and occasionally a tie. Employee Judith Wilbur was also examined concerning Becker's status. She testified, like Goula, that she did not know what Becker's job was, but that he was usually in the office. Like Goula, she testified that he usually wears dress shirts and pants while the rank-and-file employees usually wear jeans, sweatshirts, or flannel shirts. Employee Victoria Tonte offered similar testimony.

From the record, I find it impossible to determine precisely what Becker's status was at the time of the election or whether he was eligible to serve as an observer in the Board-conducted election. Under similar circumstances, the Board has historically declined to set aside an election.[80] I therefore recommend that Objection 10 be overruled. Inasmuch as Objection 11 is not supported by the record, I likewise recommend that it be overruled.

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[74] Allegations 5(o) and (p) of the complaint, as amended at the hearing.

[75] *Ebb Tide Processing*, 264 NLRB 739 (1982).

[76] *Greenfield Mfg. Co.*, 199 NLRB 756 (1972).

[77] *H. H. Robertson Co.*, 263 NLRB 1344 (1982).

[78] The General Counsel did not examine witnesses concerning these objections.

[79] *Helena Laboratories Corp.*, 219 NLRB 686 (1975).

[80] *Southern Fruit Distributors*, 74 NLRB 72 (1947); *Earl Fruit Co.*, 107 NLRB 64 (1953).

The Requested Bargaining Order

A chronological analysis of the events contained in the record indicates that there was just one discriminatorily motivated discharge, namely, that of Zaleski in late November, and incidents of 8(a)(1) violations occurring in late November and December 1985 and January an March 1986. Despite these violations, however, the Union's organizing campaign did not flag but, on the contrary, appears to have gained momentum after the termination of Zaleski and the commission of the initial 8(a)(1) violations by Respondent's agents. The vast majority of card signers signed their authorization cards between November 23, 1985, and February 23, 1986, Respondent's violations notwithstanding. Moreover, committee meetings and general meetings of employees advocating union representation were held in February and March and were well attended.

The Board has said that in determining whether or not to issue a bargaining order, of great significance is the fact that the violations did not dissipate the Union's majority;[81] and that ultimately, with regard to imposing a bargaining order, the question to be decided is whether traditional remedies can remedy the unfair labor practices to permit a free and fair election to take place. The Board stated:

> Employee sentiment expressed in a Board-conducted election [following the commission of an employer's unfair labor practices] is an objective—not subjective—factor that can be relevant to resolving this question; indeed it is the best possible evidence.

In the instant proceeding, the fact that the violations failed to dissipate the Union's campaign is a relevant consideration in determining that direction of a new election is the proper alternative to a bargaining order.

In light of the above, I find, as stated by the Board in *Sunbeam Corp.*,[82] that the General Counsel has failed to demonstrate that the effects of Respondent's violations were so substantial that their effects cannot be erased by the use of traditional remedies and that the question concerning representation raised by the Union's petition cannot be resolved by the preferred method of a Board election and rerun election if necessary. I shall therefore recommend that the request for a bargaining order be denied.

On the other hand, since I have found that the Respondent has engaged in conduct which impermissible interfered with the April 3, 1986 election, I shall recommend that if the counting of the valid challenged ballots results in a majority thereof being cast against representation, that the election be set aside and a new election directed.[83]

The Challenges

In his report and recommendations on objections to election and challenged ballots the Regional Director concluded that with regard to the eligibility of certain challenged voters, substantial and material factual issues existed which could best be resolved on the basis of record taken at the instant hearing. consequently, in accordance with the Regional Director's determination, and based on the Findings of Fact, supra, I make the following recommendations with regard to eligibility:

David Williams. Williams was challenged by the Board and by the Employer on grounds that his name did not appear on the eligibility list. Petitioner and the General Counsel contend that Williams was discharged in violation of Section 8(a)(1) and (3). I have found, however, that he was discharged for cause prior to the eligibility cutoff date. I recommend that the challenge to his ballot be sustained.

John Zelinski. John Zelinski was challenged by the Employer on grounds that he had been terminated for legitimate, nondiscriminatory reasons well in advance of the election. Despite the contentions of the General Counsel and the Petitioner that his termination was violative of the Act, I have found, in agreement with the Employer, that it was for cause and recommend that the challenge to his ballot be sustained.

The following employees:

Peter Zelinski	Mary Christine Shively
James Walker	Lois Thompson
Michael Studders	Wendy Vogel
Nancy Scarantino	Victoria Tonte
Robert Skasko	Kevin Goula
Sharon Thorne	Judith Wilbur[84]
Armand Poli	Dorothy Resavy
James Masters	

were challenged by the Employer. They were all laid off on March 21, 24, or 27. The General Counsel takes the position that of these 15 employees, 10 of them: Peter Zelinski, Michael Studders, Victoria Tonte, Nancy Scarantino, James Walker, Wendy Vogel, Bob Skasko, Jim Masters, Dorothy Resavy, and Kevin Goula were discriminatees whose ballots should be opened and counted. The General Counsel takes no position with regard to the remaining challenged ballots.

The Petitioner contends that all employees terminated March 21–27 were terminated for discriminatory reasons because of their known or suspected union activities or sympathies. In the alternative, the Petitioner takes the position that if these employees are found not to be discriminatees, then they should be considered laid-off employees who had a reasonable expectancy of recall in the near future and in either case eligible to vote.

The Employer denies that the March 21–27 layoffs were discriminatorily motivated but rather were legitimate nondiscriminatory layoffs resulting from a customary periodic drop in business. Such layoffs, the record indicates, were not infrequent in the past and shows that in each case the Employer attempted to, and did, in fact, recall laid-off employees when its production requirements increased. The March 21–27 layoff was an economic layoff and no different from previous layoffs. Management intended to recall, once again, many of its employees and advised them that it would do so.[85] I find that these employees had a reasonable expectancy

[81] *Times Wire & Cable Co.*, 280 NLRB 19 (1986).

[82] 287 NLRB 996.

[83] *Sunbeam Corp.*, supra.

[84] The eligibility of Judith Wilbur is conceded by the Employer in its brief.

[85] The Employer called management and supervisory personnel to testify that the employees challenged were poor employees whom it did not intend to recall because of various work-related incidents in which they had been involved. I do not rely on this testimony, however, because 12 of the 15 employees laid off in March were union activists; because the Employer, the record reveals, was well aware of the activity of most of them; because none of them were terminated at the time of their alleged transgressions; because those employees who had, in fact, committed the acts of which the Employer

of recall and recommend that the challenges to their ballots be overruled.[86]

Jeanie Cicon. Jeanie Cicon was challenged by the Board agent and by the Employer because her name was not on the eligibility list. The General Counsel takes no position with regard to her eligibility but notes that she was terminated prior to the election and is not alleged to be an 8(a)(3) discriminatees. The Employer takes the position that the challenge to Cicon's ballot should be sustained because she was lawfully terminated prior to the election. I find that the record supports the Employer's challenge and recommend that its challenge be sustained.

Catherine Bonitz. The ballot of Catherine Bonitz was challenged by the Board agent and by the Employer because her name was not on the eligibility list.

I recommend that the challenge be sustained inasmuch as Bonitz was hired after the eligibility cutoff date.

Rosemary Carey. The ballot of Rosemary Carey was challenged by the Board agent and the Petitioner because her name was not on the eligibility list. The Petitioner would exclude Carey as a supervisor. The Employer denies that Carey is a supervisor.

The record reflects that Carey, at the time of the hearing, was Veronica Supinski's[87] assistant. Supinski would make out the schedule and hand it to Carey. Carey would then pass on instructions to the employees from Supinski or Marsden.[88] Carey also would show new employees what their newly assigned duties were. Her duties did not include any of the standard indicia of supervisoryship. The record is devoid of information as to what Carey's duties were during the critical period. As of the pay period ending January 17, 1986,[89] Carey received $4.25 per hour, the same as the lowest paid rank-and-file employees. I find the record insufficient to warrant any conclusion as to Carey's inclusion or exclusion with regard to unit placement.

Paul Bellock. Bellock was challenged by the Board agent and by the Petitioner because his name did not appear on the eligibility list. The Petitioner asserts that Bellock was not hired until after the eligibility cutoff date. Payroll records and other evidence indicates, contrary to the Petitioner's position, that he was employed prior thereto. I recommend that his ballot be counted.

Florencio Gomez, Hector Colon, and Lucien Delva. These three individuals were challenged by the Board agent and the Petitioner because their names did not appear on the eligibility list. The Petitioner argues that all three are supervisors within the meaning of the Act and consequently the challenge to their ballots should be sustained.

The Petitioner supports its position with regard to Gomez by arguing that he effectively recommended Tonte and Vogel for recall when it had been decided earlier that they should not be recalled because of poor work performances and that Gomez' wage rate was much higher than that of other rank-and-file employees. The Petitioner supports its position with regard to Colon and Delva solely on the basis of their receiving higher wages than most rank-and-file unit employees.

I find the record insufficient to warrant any conclusion as to the supervisory status of Gomez, Colon, or Delva and recommend no decision be made at this time concerning their status. Rather, I recommend that if, after the ballots herein found valid are counted, the ballots of Carey, Gomez, Colon, and Delva are determinative of the results of the election, the hearing be reopened and further evidence adduced as to their status.[90]

To summarize my recommendations on the challenges, I find that the ballots of the following employees should be opened and counted:

Peter Zelinski	Dorothy Resavy
Mary Catherine Shively	James Masters
James Walker	Paul Bellock
Lois Thompson	Michael Studders
Wendy Vogel	Nancy Scarantino
Victoria Tonte	Robert Skasko
Kevin Goula	Sharon Thorne
Judith Wilbur	Armond Poli

I also find that the challenges to the ballots of the following individuals should be sustained:

David Williams	John Zelinski
Jeanie Cicon	Catherine Bonitz

and that in the event, after the recount, the challenged ballots of the following individuals prove determinative, that the hearing be reopened for the purpose of adducing additional evidence as to their eligibility:

Rosemary Carey	Florencio Gomez
Hector Colon	Lucien Delva

If, following the final count, it is determined that a majority of valid votes were cast for the Petitioner, I recommend that it be certified. If, on the other hand, it is determined that a majority of valid votes counted were not cast for the Petitioner, inasmuch as I have found certain objections filed by the Petitioner to be meritorious, I recommend that the election be set aside and a new election conducted.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth above, occurring in connection with its operation described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate and affirmative action designed to effectuate the policies of the Act. In particular, as

complains had done so long before their general layoff in March 1986 and must be presumed to have been rehabilitated; and because a number of them were subsequently rehired, thus indicating that the Employer did not consider their work-related problems to be so serious as to deny them reemployment.

[86] *Atlas Metal Spinning Co*., 266 NLRB 180 (1983); *Data Technology Corp*., 281 NLRB 1003 (1986).

[87] Admitted supervisor.

[88] Ibid.

[89] The latest payroll figures available in the record.

[90] A motion to reapen for this purpose was filed by the Employer on November 4, 1987, and deferred for later ruling by order dated November 12, 1987.

I have found that Ed Zaleski was discriminatorily terminated, I shall recommend that Respondent be required to offer full and immediate reinstatement, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950); and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By creating the impression of surveillance of its employees' union activities; promising employees wage increases, bonuses, insurance, and other benefits in order to discourage its employees from supporting the Union; granting its employees wage increases and bonuses for the same purpose; interrogating its employees about their own union activities and those of other employees; threatening employees with discipline and discharge if they refused to distribute Respondent's antiunion literature; soliciting grievances and complaints from employees thereby promising them improved terms and conditions of employment in order to discourage their union activity; soliciting employees to form their own labor organization; threatening employees with a reduction in benefits, layoffs, other unspecified reprisals, and closure of the facility in order to discourage their union activity; and interrogating an employee as to the nature of his testimony to be given at a forthcoming Board hearing and instructing an employee to withhold evidence while testifying at the Board hearing, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging/laying off Ed Zaleski because he engaged in union activities, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

[Recommended Order omitted from publication.]